IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE K.THANKAPPAN

WEDNESDAY, THE 13TH DECEMBER 2006 / 22ND AGRAHAYANA 1928

CRL.A.No. 1853 of 2006(C)

SC.546/2001 of ADDL.SESSIONS COURT-TRIAL OF ABKARI ACT CASES,NEYYATTINKARA
CP.304/2000 of JUDL. MAGISTRATE OF FIRST CLASS COURT-II,NEYYATTINKARA

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APPELLANT:

SHAJI, C.NO.9856,
CENTRAL PRISON, TRIVANDRUM.

BY ADV. ADV.N.K.SUBRAMANIAN(STATE BRIEF)

RESPONDENT:

STATE OF KERALA REPRESENTED BY
A PUBLIC PROSECUTOR.

BY PUBLIC PROSECUTOR SRI.C.M.NAZAR

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 13-12-2006, THE COURT ON 13/12/2006 DELIVERED THE FOLLOWING:

K. Thankappan, J.

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Crl. A. No. 1853 of 2006

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Dated this the 13th day of December, 2006

JUDGMENT

The appellant, accused in S.C.No.546/2001 on the file of the Court of the Addl. Sessions Judge for the Trial of Abkari Act Cases, Neyyattinkara, was charge-sheeted for the offence punishable under section 55(a) of the Abkari Act on the allegation that he was found in possession of 5 litres of illicit arrack in a 5 litre can. He was arrested and the contraband article was seized. To prove the charge against the appellant, the prosecution examined PW1 to PW4 and Exts.P1 to P7 were marked. MOI was also marked. After closing the prosecution evidence, the appellant was questioned under section 313 Cr.P.C. He denied the allegation levelled against him. However, on accepting the prosecution evidence, the trial court found the appellant guilty under section 58 of the the Abkari Act and he was convicted thereunder and sentenced to undergo rigorous imprisonment for two years and a fine of Rs.1,00,000/- with default sentence of a rigorous imprisonment for a period of three months. The above conviction and sentence are under challenge in this appeal.

2. This Court heard learned counsel for the appellant as well as the learned Public Prosecutor

3. Firstly, the learned counsel for the appellant submits that the court below went wrong in finding that the appellant was guilty under section 58 of the Abkari Act, as there was no charge against the appellant under the above section. Secondly, the learned counsel submits that the trial court went wrong in accepting the evidence adduced by the Excise officials. Thirdly, the learned counsel submits that the Excise officiasl are violated the provisions of section 53 of the Abkari Act and the provisions of the Excise Manual while seizing the contraband article, taking the sample for analysis.

4. To prove the case against the appellant the prosecution relies on the evidence of PW1 to PW4. PW1 and PW2 are Preventive Officers of Neyyattinkara Excise Range. PW1 who accompanied PW2 in the patrolling duty. They deposed that on 1-6-1996 at about 1 P.M. while they were conducting patrol duty, they found the appellant at Chappathu-Puthalam M.L.A.Road at Kottukal pakuthi, Kottukal desom carrying a 5 litre can, which on examination was found to have filled with illicit arrack of about 5 litres and the appellant was arrested and the contraband article was seized. PW2 prepared arrest memo and seizure mahazar. These two witnesses were cross-examined by the defence counsel, their evidence was not shattered. PW3 Investigating Officer who laid the charge sheet stated that as per the direction of the Magistrate, he extracted sample and forwarded the

same to the Chemical Examiner. He proved Ext.P7 thondi register. Ext.P6 chemical analysis report would show that the sample contained 29.8% ethyle alcohol. The trial court after perusing the evidence found that the prosecution had succeeded in establishing the guilt of the appellant beyond reasonable doubt under section 58 of the Abkari Act that the appellant was in conscious possession and control of 5 litres of illicit arrack in MO1 can at the time when he was arrested. On appreciating the entire evidence, this Court is of the view that the trial court has rightly accepted the evidence and found that the appellant was in possession of 5 litres of illict arrack in MO1 can at the time when he was arrested.

5. Admittedly, as per the charge framed by the trail court the offence alleged is under section 55(a) of the Abkari Act and the trial was conducted under the above charge. But the trial court found the appellant guilty under section 58 of the Abkari Act. As per section 228(2) Cr.P.C., where the Judge frames any charge under clause (b) of sub-section(1), the charge shall be read and explained to the accused and the accused shall be asked whether he pleads guilty of the offence charged or claims to be tried. The charge framed against the appellant is under section 55(a) of the Abkari Act. Hence, there was no proper charge framed against the appellant for trail under section 58 of the Abkari Act .

6. Section 222(2) Cr.P.C. reads as follows:-

> **"(2) When a person is charged with an offence and facts are proved which reduce it to a minor offence, he may be convicted of the minor offence, although he is not charged with it".**

When the appellant was charged under section 55(a) of the Abkari Act, he was found guilly under section 58 of the Abkari Act. Though the above sections are dealing with different offences, the nature of punishment be awarded is one and the same. Hence, the first contention of the learned counsel is not acceptable. With regard to the facts now proved and the nature of the allegation levelled against the appellant, it has to be considered whether the appellant would cause any prejudice for finding him guilty under section 58 of the Abkari Act instead of section 55(a) of the Abkari Act. Section 55 of the Abkari Act deals with for illegal import etc. Section 55 (a) of the Act deals with imports, exports, transports, transits or possesses liquor or any intoxicating drug. As per section 55(1), for any offence under section (a) is imprisonment for a term which may extend to ten years and with fine which may shall not be less than rupees one lakh. As per section 58 of the Abkari Act, whoever, without lawful authority, has in his possession any quantity of liquor or of any intoxicating drug, knowing the same to have been unlawfully imported, transported or manufactured, or knowing the duty tax or rental payable under the Act not to have been paid

therefor, shall be punishable with imprisonment which may extend to ten years and with fine which shall not be less than rupees one lakh. Hence, unless and until it is proved by the appellant that he would cause any prejudice by awarding punishment under section 58 of the Abkari Act , this Court is not inclined to interfere with the the conviction and sentence awarded against the appellant under section 58 of the Act. Hence, the first contention of the learned counsel for the appellant is rejected.

7. It has come out in evidence that the two independent witnesses were already questioned by the Excise officials and theywere cited as CW2 and CW4, they were not available for examination as one of them died and another person could not be located. In the above circumstances, this Court is of the view that the evidence given by the Excise officials can be safely accepted. The second contention is answered against the appellant.

8. With regard to the third contention that while seizing the contraband article and taking the sample, the Excise officials have violated the provisions contained in the Abkari Act and the Excise Manual, the trial court found that there was no discrepancy in the deposition of PW1. PW2 detecting officer deposed in corroboration to what PW1 deposed before court touching the occurrence, who identified Ext.P1 prepared by him, so also the arrest memo Ext.P2. PW4 Thondi Section Clerk deposed that as per the direction of the Magistrate, he extracted sample and forwarded the

same to the Chemical examiner. It has come out in evidence that the contraband article was produced before the court on 1-6-1998 itself. In the above circumstances, this Court is of the view that the third contention is not tenable and hence it is rejected.

9. Hence, the this Court is of the view that the order under challenge would require any interference by this Court. Accordingly, the conviction and sentence awarded by the trial court are confirmed and the appeal is dismissed.

K.Thankappan,
Judge.

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K. Thankappan,J.

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Crl.A.No. 1853/2002

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Judgment

13-12-2006